1995

Salt Lake City v. David Lee McClain : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

SALT LAKE CITY, A Municipal Corporation, Plaintiff and Appellee, v. DAVID LEE MCCLAIN, Defendant and Appellant.	APPELLEE'S BRIEF Case No. 95-00173-CA Priority No. 2

BRIEF OF APPELLEE

Appeal from a judgment and conviction of Driving Under the Influence of Alcohol, a class B misdemeanor, in violation of Salt Lake City Code § 12.24.100 (1995), in the Third Circuit Court in and for Salt Lake County, State of Utah, Salt Lake Department, the Honorable Sandra Peuler, Judge, presiding.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES CITED

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BRIEF OF APPELLEE

JURISDICTIONAL STATEMENT

Jurisdiction is conferred on the Court of Appeals by Rule 26(2)(a), Utah Rules of Criminal Procedure, Title 78 Chapter 2a, Section 3(2)(f), Utah Code Ann. (1953 as amended) and by Article VIII, Section 5 of the Utah Constitution.

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

The pertinent parts of the following statutes are provided in Addendum A of the Defendant/Appellant's Brief:

1. Salt Lake City Code § 12.24.100.
2. Salt Lake City Code § 12.52.350.
3. Salt Lake City Code § 12.52.360.

4. Art. I, Sec. 7, Utah Constitution.

5. Amend. V, United States Constitution.

STATEMENT OF THE ISSUES

Pursuant to Utah Rule of Appellate Procedure 24(b), the plaintiff and appellee will not present an independent Statement of the Issues.

STATEMENT OF THE CASE AND NATURE OF THE PROCEEDINGS BELOW

Pursuant to Utah Rule of Appellate Procedure 24(b), the plaintiff and appellee will not present an independent Statement of the Case.

STATEMENT OF THE FACTS

On September 10, 1994, Officers Kenneth D. Dailey, Jr. and Roger K. Williams of the Salt Lake City Police Department Motorcycle squad were on duty in the vicinity of State Street and approximately 1900 South Street in Salt Lake City. R.81,137. The officers' attention was drawn to large gold or yellow sedan. R.82,137. The officers observed that vehicle make a U-turn, travel across a raised island, and commit other traffic violations. R.82,137.

The officers were on motorcycles at the time, riding side by side. R.82,85. The officers were headed northbound on State Street in the area of 1900 South State Street. R.83. The suspect vehicle was initially headed southbound. It then crossed the raised traffic island and moved into the northbound middle lane. The vehicle then weaved again onto the traffic island with its two left wheels going up onto the traffic island and then back down again into the left traffic lane. R.83. When the vehicle made its U-turn it was approximately 2-4 car lengths from the oncoming motorcycle officers. R.84.

When the vehicle was in the center northbound lane and moved into next inner lane, it did not give any signal of intention to turn. R.84. The movement from the middle lane to the next lane was almost immediately subsequent to the U-turn. R.84. This next lane was the left turn bay. R.86. The vehicle moved into the turn bay and stopped. R.86,138. No traffic control device controlling the left turn bay was present at the intersection. R.87. The vehicle remained in the turn bay for a period of time even though there was time for it to proceed in front of oncoming traffic. R.86,138. During that period of time the suspect vehicle could have turned left safely, but did

not. R.86,138. Instead the vehicle remained stationary until a southbound oncoming car almost got to the intersection. R.86,138. At that point in time, the suspect vehicle turned in front of the oncoming car, failing to yield to it. R.86-87,138. That car had to brake and yield to the suspect vehicle as it made its left turn. R.86,138. The officers turned on their lights and sirens, and the oncoming southbound vehicle yielded to the officers as they followed the suspect vehicle in an attempt to get it to pull over. R.87,138.

The suspect vehicle turned left onto Coatsville Avenue. R.88. The officers followed almost to the end of Coatsville, which placed the suspect vehicle nearly to Main Street. R.88. At that point, the suspect vehicle pulled over. R.88. The vehicle traveled nearly three-quarters of a block down Coatsville. R.88. As it traveled down the street there were opportunities for it to pull over. R.88. As the vehicle traveled down the block, the driver made movements in the vehicle other than holding the steering wheel. R.88. Officer Dailey could see the driver's shoulders dipping down and his head dipping down. R.88. Officer Williams testified that it looked as though the defendant was reaching over to the passenger side of

the car and then back and under the driver's side of the car. R 139. This raised officer safety concerns. R.88. It also raised concerns about evidence. R.89.

When the vehicle was stopped, "the driver exited the vehicle immediately and then leaned up against the vehicle." R.90. The officers dismounted from their motorcycles and approached the driver. R.90. There were no passengers in the vehicle. R.90. As Officer Dailey began his initial contact he could smell a "real heavy odor of alcohol", 'strong and distinct". R.90. The driver's eyes were observed to be red and watery. R.91. The driver's speech was "very slurred". R.91. When the officer asked the driver whether he had been drinking, the driver initially responded the he had had nothing to drink. R.91. After arrest, the driver admitted to having had one drink. R.91. The driver was identified as the defendant, David Lee McClain. R.93.

Officer Dailey asked the defendant to perform field sobriety tests ("FST's"). R.93. The officer was only able to administer two FST's to the defendant. R.94. This was due to the uncooperativeness and heavy impairment of the defendant. R.95. The officer started with the Horizontal Gaze Nystagmus Test ("HGN"). R.95-97. The officer noted

during the test that the defendant was noticeably swaying in all directions. R.98. Officer Williams observed the FST's and noted that the defendant had a "definite problem with balance". R.142.

The next FST administered was the nine-step walk and turn ("WAT"). R.99. The defendant was instructed to assume the instructional position for this test, but was unable to stay in that stance. R.99. The defendant said "I can't." R.99. Described as "real agitated", the defendant also grabbed Officer Dailey's wrist and told the officer that he wanted to go home. R.99. Officer Williams testified that the defendant was "cyclic", going through cycles of different attitudes and behaviors. R.156. The defendant's emotions ran the spectrum from congenial and polite to almost physically violent. R.156. Officer Williams testified that this was very characteristic of numerous intoxicated persons that he had dealt with in his seven years in law enforcement. R.156.

Both officers reached the conclusion that the defendant was sufficiently impaired to be arrested for driving under the influence of alcohol. R.100,143. The defendant was arrested for that offense and for the other traffic offenses. R.100. After being arrested and

handcuffed, the defendant said "I take so much medication it's not funny." R.100. This was an apparent reference to medications taken for diabetes. R.102,132. When first asked whether he was sick or injured, he responded no. R.132. The reference to diabetes and medication for it came later. R.132. The defendant testified that he had diabetes and high blood pressure. R.157. He testified that the diabetes caused him to have pain in his extremities. R.158. The defendant testified that when his blood sugar gets too low his speech slurs, he gets disoriented, shaky, and can go unconscious. R.158. Further, he testified that this affects his coordination and equilibrium. R.158. He testified that he regularly took medications for his diabetes. R.161,166. He testified that he also took pain killers and a medication for the nerves in his legs. R.166. The defendant asserted that all medications were prescription. R.166. He testified that he had previously gone unconscious due to his diabetes. R.163. The defendant also testified that at least one of the medications he took had an advisory against operating machinery: "[The medication] says be careful. Use caution when you're driving or operating machinery." R.169.

The defendant's vehicle was impounded and searched pursuant to standard procedure. R. 143. Officer William's search uncovered "an open quart bottle of beer in a brown bag" under the front driver's side seat. R. 143. That bottle felt cold to the touch, and contained an amber liquid. R.144. That liquid "looked like beer", "Smelled like beer", and "had the consistency of beer when dumped on the ground". R.154. That bottle "had the cap on it but the seal had been broken and approximately two-thirds of the beer [was] gone." R.144. The officer also found two open beer cans with a small amount of fluid still in them in the back seat. R.143-44.

The defendant was then asked to submit to an Intoxilyzer test. R.100. The defendant was read the standard State admonitions. R.101. The defendant's response to the request was: "No. My doctor will kill that." R.101.

The first reference in the trial transcript to the defense witness' availability comes at the conclusion of the first prosecution witness' testimony, when the court decided to break for lunch. R.133-134. This would have been at approximately 12:30 p.m., as the court indicated that the court would reconvene at two o'clock, providing a

break of almost an hour and one-half. R.133. At that time, the court indicated that its understanding was that the witness had informed the defense that he would not be available until four o'clock in the afternoon. R.134.

The court asked whether the witness had been subpoenaed, "as witnesses usually are." R.134. Defense counsel's response was: "Actually, I don't think, I ever did subpoena him. I talked to him and he assured me that he would be here at four o'clock, but I didn't subpoena him." R.134.

The court stated that it was cognizant of the fact that the defendant wanted the witness to testify, and that defense counsel felt that the witness was an important one. R.134. The court indicated that it was willing to take witnesses out of order, break at odd times, or anything else it took to accommodate the witness' schedule. R.134. The court indicated that if all other testimony ended "shortly before four", that the court would be willing to take a recess and give the witness an opportunity to come at four o'clock. R.134. (emphasis added). The trial court indicated that it was not willing to have the jury sit around for an hour if testimony ended at three o'clock. R.134. The court indicated that it was

not reasonable to have all parties involved wait an hour or more for a witness. R.135. The court also indicated that the witness needed to be present earlier if possible. R.135.

Defense counsel argued that if the defense had 6 or 10 important witnesses which would lengthen the trial that the court would have granted a continuance. R.135. Defense counsel acknowledged that the jurors might be required to sit around for an hour or more, but argued that it was important to his client's right to a fair trial to have the witness testify. R.135. The judge responded that if there were 6 or 10 witnesses the trial would not be done in one day. R.135. The court indicated that if the trial were scheduled for two days, there would be more latitude to accommodate the defense request. R.135. The court recognized that the parties had other commitments the next day. R.135.

The court pointed out that if the defense wanted a witness present, that witness should have been subpoenaed. R.136. Further, that witness was required to appear at a time that was reasonable for everybody, including the jurors. R.136. The court also expressed concern over the prejudicial effect a defense delay might have on the

defendant, where the jury would know the reason for the delay and influence the jury decision. R.136.

SUMMARY OF THE ARGUMENT

No abuse of discretion occurred when the trial judge denied the defendant's request for a recess. The defense had been aware of the schedule problems of its witness. With that knowledge, the defense could have taken steps prior to trial to accommodate the witness' schedule without imposing on the court.

The defendant's ability to defend himself was not compromised by the trial court's decision, but by a failure to take appropriate action prior to the date of trial. The witness was not subpoenaed. The defense points to no efforts prior to trial to provide notice to the court or the prosecution that the witness would not be available until late in the day.

The request was unreasonable in light of the failure to subpoena, seek a continuance, or at a minimum provide notice to the court and seek its approval prior to the date of trial.

Since the basis for denying the recess can be attributed to the defense, it was not an abuse of

discretion for the trial court to deny the subsequent request to reopen the case.

Denial of the request for a reckless driving lesser included offense was not improper. Under either the "necessarily included" or the "evidence based" standard, the instruction should not have been included.

ARGUMENT

I. THE TRIAL COURT'S DENIAL OF THE DEFENSE REQUEST FOR A SHORT RECESS DID NOT VIOLATE THE RIGHT TO FAIR TRIAL AND TO DUE PROCESS.

Due process rights, and the right to a fair trial, should not be read to permit a defendant to escape his own responsibility to present a defense. The defendant cites State v. Maestas, 815 P.2d 1319 (Utah App. 1991), as support for the proposition: "An important part of due process of law, and the right to a fair trial, is an 'opportunity to defend.'" Defendant's Brief at 6 (hereinafter "DB"). In the context of exclusion of alibi testimony in a criminal trial, Maestas held that the defendant's due process rights were not violated. Maestas, 815 P.2d at 1324-25. The defendant in Maestas "did not comply with the statutory requirements of filing a notice

of an alibi witness." Maestas, 815 P.2d at 1324. The Court stated:

> Defendant had the opportunity to present alibi testimony. All he needed to do was comply with the timing requirements of section 77-14-2. The witness, whose testimony was excluded in this case, did not suddenly materialize during the trial. She was known to the defendant from the outset of the case. * * * *

Maestas, 815 P.2d at 1325.

The defendant also cites Provo City v. Werner, 810 P.2d 469 (Utah App. 1991), as support. DB at 6. In the context of independent testing in DUI trials, Provo City held that "all that is required to provide due process is an opportunity to obtain an independent test." Provo City 810 P.2d at 472. The basis for the ruling was that the defendant had made an "inadequate effort" to obtain an independent test: "Defendant, not the police, was responsible for her failure to obtain a second test." Id.

In both Maestas and Provo City the failure of a defendant to take measures to ensure the availability of evidence at trial did not constitute a due process violation. The defendant here points to no attempts prior to trial to ensure the timely presence of the witness. The defendant appeared on the date of trial expecting the

trial court to accommodate the witness' schedule without so much as subpoenaing the witness to ensure his appearance. Other alternatives were available.

Prior to trial, the defendant could have sought a continuance to a date accommodating the witness' schedule and the trial court and other parties. The defendant could have made a pretrial motion requesting prior authorization for the late appearance of the witness to provide the court and other parties with notice of the potential problem. There is no indication that the defendant made any such attempts. Where the defendant failed to make reasonable efforts prior to trial which could have resolved the scheduling problem, the trial court's denial of a recess at trial becomes all the more reasonable. Since the defendant's efforts here were inadequate, no due process violation of the right to a fair trial should be found.

State v. Creviston, 646 P.2d 750 (Utah 1982), sets forth the criteria regarding continuances:

> It is well established in Utah, as elsewhere, that the granting of a continuance is at the discretion of the trial judge, whose decision will not be reversed by [the Utah Supreme Court] absent a clear abuse of that discretion. Abuse may be found where a party has made timely objections, given necessary notice and made a

> reasonable effort to have the trial date reset for good cause.

Creviston, 646 P.2d at 752 (citations omitted). The City submits that these same criteria should be applied irrespective of whether the defendant's request is characterized as a recess or a continuance. While the defendant's request was for a break in the trial not extending to another date, the fact that the defendant knew of the potential problem before the date of trial subjects the defendant's request to the continuance analysis. The defendant makes no reference to any pretrial attempt to provide notice or a reasonable effort to have the trial reset. Without such a showing, it was not a clear abuse of discretion on the part of the trial court to deny the request for a recess.

Beverly v. Cardinal, 743 P.2d 442 (Colo.App. 1987), is distinguishable from the case presently before the Court. There, the appellate court reversed the trial court's decision to deny the request for a continuance in the nature of a recess and remanded for a new trial. Beverly, 743 P.2d at 444. However, one of the factors crucial to the Beverly court was the fact that the witness there had been properly subpoenaed to appear before the trial court. Id. The witness here was not subpoenaed. Therefore,

under the "totality of the circumstances" suggested by the Beverly court, no abuse of discretion occurred in the present case. Id.

People v. Spears, 474 N.E.2d 1189 (N.Y. 1984), can also be distinguished. There, unexpected circumstances which occurred at trial provided the basis for reversal on appeal. The defendant's counsel "requested a brief delay, after the codefendant testified and rested unexpectedly, to consult with his client about taking the stand, implicating defendant's fundamental right effectively to confer with his counsel." Spears, 474 N.E.2d at 1190. The "brief delay" in Spears consisted of a request to continue to the next morning where the request was made at five minutes to five at the end of a trial day. That request was denied by the trial court. Next, defense counsel requested a "few minutes" to speak with his client. The trial court interrupted defense counsel after five seconds, demanding that the defense proceed. Instead the defense rested, and the court recessed for the day. Spears, 474 N.E.2d at 1190. The unexpected circumstances in Spears should be distinguished from those presently before the Court. In Spears, the defense request was due to unexpected circumstances. The situation with Mr.

McClain's witness was not unforeseen. The doctor had told defense counsel that he was not available until 4:00 o'clock, and defense counsel proceeded to trial with that knowledge, without notifying the court or the prosecution, and without seeking alternative solutions.

Mr. McClain was not denied his right to due process and to a fair trial due to the actions of the trial court. Any such infringement resulted from the defense failure to utilize available options to remedy the time concerns. It was manifestly incorrect for the defense to assume that the trial court would just have to wait for its witness. Where the defense does not assert alternative procedural avenues to protect its constitutional rights, the defense should not be heard to complain that the court turns a deaf ear to its problem.

Not only would the jury have been required to serve longer, but every other player in the trial: the judge, the prosecution, the court clerk, and the other witnesses. The time of these other parties to the proceedings is dismissed all too lightly by the prosecution. If the witness was so important to the case, surely he merited a subpoena. Surely the witness merited an attempt at continuance to accommodate both his busy schedule and the

trial court's. The right to a fair trial does not entitle the defense to disregard the time of others involved. Especially where there were reasonable alternatives prior to trial.

The defendant asserts that "[t]he witness was identified, and he was going to be present to testify at the end of the requested recess." DB at 9. While the defense assertion that the witness was going to appear did prove true, at the time the request was made, the trial court had no such assurance. While a subpoena is no guarantee a witness will appear, the defense had not bothered to send a subpoena to the witness. The trial court was asked to recess for an hour for a witness the defense had not even bothered to subpoena. The defendant's witness was a physician, presumably subject to the scheduling problems and emergencies of such professionals. There was simply no guarantee the defendant's witness was going to appear. The uncertainty suggests the trial court's decision not to recess was all the more reasonable.

The defendant cites Rutzen v. Pertile, 527 N.E.2d 603 (Ill.App. 2 Dist. 1988). This case is also distinguishable. Here the late witnesses were delayed

beyond the trial court's deadline by flight delay and inclement weather. Rutzen, 527 N.E.2d at 608.

The defendant also cites Great Plains Supply Co. v. Erickson, 398 N.W.2d 732 (N.D. 1986). "A trial court abuses its discretion when it acts in an unreasonable, arbitrary, or unconscionable manner." Great Plains, 398 N.W.2d at 734. The trial court here did none of the above. It was unreasonable for the defense to assume that a trial court would, as a matter of course, grant a recess on the date of trial where the defense has had prior notice of the particular problem and has not provided prior notice of it to the court. Any unconscionable or arbitrary action should be charged to the defense.

The defendant presents the Slavenburg factors for this court's consideration. Slavenburg v. Bautts, 561 P.2d 423 (Kan. 1977). Defendant's Brief at 11. The City would submit that the gateway element of those factors should be emphasized here. The gateway factor is that of "counsel's diligence and effort to gain attendance of the witness". Slavenburg, 561 P.2d at 428.

Defendant's counsel did not subpoena the witness. Defendant's counsel relied on the representations of a busy professional that he would be present at a time

certain. The trial court indicated that it would be willing to make reasonable accommodations to the expert's schedule, i.e., taking the expert out of turn, etc. However, requesting the trial court to recess for an hour The defendant's counsel asserts the expense of subpoena as a rationale for not subpoenaing this particular witness. It is absurd to argue the expense of subpoena where that should be offset against the cost one hour of judicial time, prosecutorial time, prosecution witnesses, and jury expense, court clerk. The defendant is not entitled to delay where the defendant had less burdensome alternatives available.

The defendant had a number of alternatives which were not explored. First and foremost was the option of a continuance prior to the date of trial. The defendant could have requested either by stipulation or by order of the court a continuance of the trial date to ensure the expert's timely appearance. This would have involved ascertaining the expert's schedule in advance and obtaining a trial date which coincided with the expert's schedule such that other participant's in the proceedings would not have been imposed upon.

Further, there is no suggestion in the record that the defendant had consulted with the City or the trial court as to whether they had any objections to the defendant's expected manner of proceeding prior to the date of trial.

The next Slavenburg element or factor is the reason the witness is not present. Slavenburg, 561 P.2d at 428. The witness was apparently unavailable due to the expert's busy professional schedule. The nature of the expert's practice [medicine] becomes a valid basis on which to deny the defendant's request for recess. There is simply no way to assure that a unsubpoenaed witness will appear, let alone a busy medical professional. The defendant was asking the court to recess for at least one hour when there was no assurance the expert would appear, even at the time represented by the defendant.

The defendant attempts to argue that the testimony of the expert might have shortened the ultimate time of the trial. Such speculation should be disregarded.

The next element is the nature of the expected testimony. Slavenburg, 561 P.2d at 428. The defendant proffered that the expert was going to testify that the defendant did indeed have diabetes. DB at 12. The city never challenged the assertion that the defendant suffered

from diabetes. The defendant further proffered that the expert would have testified that "a diabetic suffering from low blood sugar can become disoriented, have slurred speech and have trouble with his motor coordination." DB at 12. The City never challenged the defendant's assertion that he was taking medication or that it affected him in the manner he testified. The expert would not have been able to testify from personal knowledge that the defendant had not consumed alcohol that night. The significance of the expert's testimony to the verdict is overstated.

As to the element of the criticality of the expected testimony (Slavenburg, 561 P.2d at 428), the real question is why, if this testimony was so crucial to the defendant's case, (a) the expert was not subpoenaed or (b) if there was any doubt regarding the expert's timely appearance the defendant did not seek a continuance. It is not appropriate for the defendant to claim evidence or testimony was crucial where the defendant has not taken all available steps to ensure that testimony is heard prior to the date of trial.

The defendant asserts that the expert's testimony as to medication would have been "crucial". Again, the

defendant overstates the importance of the expert's testimony. Where alcohol, illegal medication, or prescribed medication can provide a basis for a conviction of driving under the influence, the expert's testimony would have added little. The defendant asserted that he took prescribed medication and that it affected him in certain ways. The defendant asserted that he reacted in specific ways to his diabetes. The City did not challenge the defendant's assertions in this regard. The City could have argued, even with the expected expert testimony, that the defendant was driving under the influence of alcohol and/or legal medications.

The fact a person's prescription medication interacted with alcohol provides a basis for conviction. The expert would not have been able to testify as what alcohol the defendant consumed that date. There was at least no proffer on this point (i.e., no independent blood alcohol content testing).

Regarding the element of expected delay (Slavenburg, 561 P.2d at 428), while defendant's counsel assured the court that the expert would appear at 4:00, and in fact, the expert did appear, the defendant was in actuality requesting the trial court to delay the proceedings for a

witness that might not appear at all or might appear subsequent to the 4:00 timeframe. Thus, defendant placed the trial court in the position of delaying the trial for a minimum of an hour with no assurance, other than verbal assurances, that the wit would in fact appear. This is in fact a substantial burden in light of the common knowledge that medical professionals are subject to changes in schedule at any given time. Simply put, the defendant was asking the court to wait one hour when the expected expert could well have been delayed, putting the court to an hour's delay based on a mere hope.

As to the element of the effect of the delay on the docket of the trial court (Slavenburg, 561 P.2d at 428), the defendant asserts that the requested delay "would not have had any effect on the docket of the trial court". The "only possible effect" was not a 50 minute longer trial. The delay could have been granted by the court, only to have the witness not appear due to an emergency. The witness may have appeared on time, and due to the delay, the trial might have been required to have been continued to another day. Since all parties (prosecution, defense, and trial court) had other commitments and responsibilities, such a delay would have imposed a

considerable burden on the parties concerned. This is not to even address the imposition on the jurors or to the city's witnesses if the trial was continued to the next day, or another day later on the calendar. This would have raised other issues of continuity, potential hostility of jurors to the party responsible for the continuance, etc. If the trial was continued to another date, where the expert was required, the expert's busy schedule would again be of concern.

All of this could have been avoided had the defendant simply requested, prior to the trial date, a continuance to accommodate the expert's schedule or discussed the issue prior to the date of trial with the other affected parties..

As to the element of the overall injustice which might result if the delay were denied (Slavenburg, 561 P.2d at 428), any resulting "overall injustice" was self-imposed, and therefore should not be grounds for reversal.

Even where the request is characterized as a continuance, no abuse of discretion occurred here. The defendant simply failed to make "a reasonable effort to have the trial date reset for good cause" and failed to exercise "due diligence". State v. Creviston, 646 P.2d

750, 752 (Utah 1982) (Cited in Defendant's Brief at 14). Presenting a witness problem to the trial court on the date set for trial, without prior notice, does not constitute a reasonable effort or due diligence where the basis of the problem was known to the defendant in advance of trial.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED THE REQUEST TO REOPEN THE CASE.

After the defense rested, the City released its witnesses. R.191. Therefore it would have been improper for the trial court to allow the defense to reopen its case. This would have denied the prosecution the ability to recall those witnesses if the defense witness' testimony merited it.

It is not difficult to imagine how the police officer's testimony would have been relevant subsequent to the defense witness testimony. While the officers were not medical experts, their personal knowledge of the events of that night would have served as the underlying facts on which any medical expert's opinion would have been based. Thus, their testimony regarding their observations of the defendant would have been crucial in answering the assumptions and opinions of the medical

expert, who was without personal knowledge of the facts specific to the date of the offense.

Denial of the request to reopen was not capricious or arbitrary under the circumstances in this case.

III. THE TRIAL COURT JUDGE PROPERLY DENIED THE DEFENDANT'S REQUEST FOR A LESSER INCLUDED OFFENSE INSTRUCTION.

Initially, the City would contest that "reckless driving" is a lesser included offense of driving under the influence. As the defendant notes in his brief, both offenses are class B misdemeanors. DB at 19. The City would submit that these offenses are alternative offenses. Further, there is a distinction between reckless driving "willful or wanton disregard for the safety of persons or property" and the DUI willful or intentional operation of a vehicle under the influence of alcohol.

The issue of jury instructions here parallels the situation in State v. Baker, 671 P.2d 152 (Utah 1983). The defendant here did not deny that the driving offenses observed occurred. In Baker, the defendant did not challenge the unlawful entry, leading the Utah Supreme Court to observe that "the only disputed factual issue is his intent." Baker at 160. Thus intent became the focus of the appellate analysis there:

> Intent must always be inferred from circumstantial evidence. The defendant argued at trial that his intoxication prevented him from forming the required intent. However, the only evidence of intoxication showed that the defendant was not seriously enough incapacitated by his drinking to cause the police to give him field sobriety tests. This is not a sufficient quantum of evidence to warrant an instruction regarding the defendant's capacity to form an intent. Even if it were, the defendant's theory would not support the giving of an instruction on criminal trespass, an offense which itself requires a specific intent. The thrust of the defendant's evidence on intoxication was to negate any specific intent at all, not to prove the existence of one of the intents necessary for criminal trespass.

Baker at 160.

The intent required for DUI is different from that required for reckless driving. The intent required for "reckless driving" is "wilful or wanton disregard for the safety of persons or property." The intent required for DUI is general - simply "willfully" operating a motor vehicle while under the influence. The DUI ordinance and statute do not refer to a specific mental intent. Therefore the mental intent required is that set forth under the general provisions for criminal responsibility.

Defendant McClain's theory of the case was that he was suffering from a diabetes-related disorientation. R.177-82. Such a theory of the case does not support the giving of an instruction on "reckless driving". The defendant

argued that he was suffering from a diabetes-related disorientation. If so, he would have been incapable of forming the requisite intent for reckless driving: "wilful or wanton disregard". The defendant did not testify that he had intentionally driven in a reckless manner. The defendant did testify that he could not remember. The defense argued that the defendant was disoriented as a result of his diabetes. Without testimony that suggested that the defendant intentionally drove with "wilful or wanton disregard for the safety of persons or property", the jury instruction was not proper.

> This is not to say that the defendant's right to a lesser included offense instruction is absolute or unqualified. * * * * The defendant's right to a lesser included offense instruction is limited by the evidence presented at trial. This limitation requires the application of the evidence-based standard discussed earlier, which is the appropriate basis for determining whether to instruct a jury regarding a lesser included offense at the defendant's request.

Baker, 671 P.2d at 157.

The second prong of the Baker analysis should be focused upon here. Under the evidence presented at trial, there would have been no "rational basis for a verdict acquitting the defendant of the offense charged and

convicting him of the included offense." The Baker Court stated:

> [T]he court is obligated to instruct on the lesser offense only if the evidence offered provides a 'rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.' * * * * The court must only decide whether there is a sufficient quantum of evidence presented to justify sending the question to the jury. . . .

Baker, 671 P.2d at 159.

As the defense argued, and the prosecution agreed, the type of traffic offenses observed are made by drivers who were not under the influence of alcohol. R.178. Similarly, the same kinds of offenses are committed by drivers which do not possess the mental intent of "wilful and wanton disregard for the safety of persons or property".

The defendant asserts that "[t]here was plenty of evidence presented at trial that defendant drove his vehicle in an unsafe manner." DB at 20. However, the evidence that was presented at trial was insufficient to prove this was done with the requisite intent of willful or wanton disregard. This was especially true in view of the defendant's assertion that diabetes was responsible for disorientation leading to the driving violations. The

driving pattern observed here would not have risen to the level of "wilful and wanton disregard" by itself.

Under the evidence presented at trial, the finder of fact could have found that (1) the defendant drove under the influence or (2) the defendant suffered from diabetic disorientation. The finder of fact would have been faced with an insufficient quantum of evidence on which to make a finding as to the defendant's intentional "wilful or wanton disregard". Under either theory of the case, the prosecution or the defense, a finding of reckless driving would have had insufficient evidentiary basis. In this regard, the evidence was not ambiguous or subject to an alternative interpretation that required the trial court to instruct on a lesser offense. See Baker at 159.

The trial judge properly denied the defendant's request for a lesser included offense instruction.

CONCLUSION

Based on the foregoing, the Plaintiff and Appellee Salt Lake City respectfully requests that the Court of Appeals affirm the defendant's conviction.

SUBMITTED this 24th day of October, 1995.

SCOTT A. FISHER
Attorney for Appellee

CERTIFICATE OF DELIVERY

The undersigned hereby certifies that s/he caused to be delivered eight copies of the foregoing to the Utah Court of Appeals, 230 South 500 East, Suite 400, Salt Lake City, Utah 84102, and four copies to the Salt Lake Legal Defender Association, 424 East 500 South, Suite 300, Salt Lake City, Utah 84111, this 24th day of October, 1995.